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Fourth Amendment--Reasonable Expectations of Privacy in Automobile Searches

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FOURTH AMENDMENT—REASONABLE EXPECTATIONS OF PRIVACY IN AUTOMOBILE SEARCHES

Rakas v. Illinois, 439 U.S. 128 (1978).
Delaware v. Prouse, 99 S. Ct. 1391 (1979).

Last Term the Supreme Court further delineated the scope of protections against unreasonable searches and seizures under the fourth and fourteenth amendments. In *Rakas v. Illinois*[1] the Court held that passengers in an automobile do not have standing to object to a search and seizure where they assert no possessory or property interest in either the auto or the items seized and do not show that they had a legitimate expectation of privacy in the area searched. In *Delaware v. Prouse*[2] the Court held that absent an "articulable and reasonable suspicion" of a violation of the law by a motorist or passenger, stopping and detaining a motorist to check his license and registration is unreasonable under the fourth and fourteenth amendments. *Rakas* and *Prouse* involved automobile searches and seizures and both were subjected to similar analysis by the Court. Nonetheless, the holdings seem surprisingly different.

Historically, the automobile has been afforded special treatment under the fourth amendment.[3] The automobile search is one of the few exceptions[4] to the rule that "warrantless searches are per se unreasonable."[5] Although an automobile is not completely unprotected, it is afforded less fourth amendment protection than a dwelling.[6] The au-

[1] 439 U.S. 128, 148 (1978).

[2] 99 S. Ct. 1391, 1401 (1979).

[3] In *Carroll v. United States*, the Court held that a warrantless search of an automobile could be made where the officer had reasonable or probable cause to believe the automobile was being used to illegally transport liquor. In his opinion, Chief Justice Taft commented that there was a lower standard of reasonableness for searching an automobile than for other places since, due to its mobility, the automobile might be gone by the time a search warrant could be obtained. 267 U.S. 132, 153–55 (1925). Since then, reasonable suspicion has been held sufficient for stopping an auto, though probable cause is apparently still required for searching it, unless it falls under a special exception to the warrant rule. *See* note 4 *infra*. In United States v. Chadwick, 433 U.S. 1, 12–13 (1977), the Court recognized that there was a diminished expectation of privacy in an automobile because it is not designed to hold personal effects and it is subject to extensive governmental regulation. The following opinions are indicative of the lesser protection afforded automobiles in the past: Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); South Dakota v. Opperman, 428 U.S. 364, 367 (1976); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion); Cady v. Dombrowski, 413 U.S. 433, 440 (1973); Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring); Coolidge v. New Hampshire, 403 U.S. 443, 464 (1971) (plurality opinion); Chambers v. Maroney, 399 U.S. 42, 47 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968); Preston v. United States, 376 U.S. 364, 366–67 (1964); Brinegar v. United States, 338 U.S. 160, 177 (1949); Husty v. United States, 282 U.S. 694, 700 (1931).

[4] There is a whole range of exceptions to the warrant standard which are judged upon the basis of their reasonableness. No warrant is necessary where exigent circumstances such as possible escape or destruction of evidence are present. *See* Mincey v. Arizona, 437 U.S. 385, 394 (1978); United States v. Santana, 427 U.S. 38, 42–43 (1976); Warden v. Hayden, 387 U.S. 294, 298 (1967). Searches and seizures incident to arrest require no warrant. *See* United States v. Chadwick, 433 U.S. at 14; United States v. Robinson, 414 U.S. 218, 224 (1973); Coolidge v. New Hampshire, 403 U.S. at 455 (plurality opinion); Chimel v. California, 395 U.S. 752, 768 (1969); Ker v. California, 374 U.S. 23, 34–35 (1963). Items in plain view can be seized without a warrant. *See* Cardwell v. Lewis, 417 U.S. at 592; Air Pollution Control Bd. v. Western Alfalfa Corp., 416 U.S. 861, 865 (1974); Ker v. California, 374 U.S. at 43; Hester v. United States, 265 U.S. 57, 59 (1924). Warrantless searches of heavily regulated industries are permitted. *See* United States v. Biswell, 406 U.S. 311, 316 (1972); Colonade Catering Corp. v. United States, 397 U.S. 72, 76 (1970). Searches by customs officials need no warrant. *See* United States v. Ramsey, 431 U.S. 606, 616 (1977). Searches can be made on probable cause. *See* Coolidge v. New Hampshire, 403 U.S. at 458 (plurality opinion); Chambers v. Maroney, 399 U.S. at 48–49; Brinegar v. United States, 338 U.S. at 170–71; Husty v. United States, 282 U.S. at 700; Carroll v. United States, 267 U.S. at 149. Inventory and car care functions of police departments require no warrant. *See* South Dakota v. Opperman, 428 U.S. at 370–71; Harris v. United States, 390 U.S. 234, 236 (1968); Cooper v. California, 386 U.S. 58, 62 (1967).

[5] Coolidge v. New Hampshire, 403 U.S. at 454–55. *See also* Mincey v. Arizona, 437 U.S. at 394; Cady v. Dombroski, 413 U.S. at 439; See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523, 528–29 (1967).

[6] *See* Delaware v. Prouse, 99 S. Ct. at 1401; Marshall v. Barlow's, Inc., 436 U.S. 307, 315 n.10 (1978); Adams v. Williams, 407 U.S. 143, 149 (1971); Brinegar v. United States, 338 U.S. at 177; Carroll v. United States, 267 U.S. at 153. That is, unless the automobile is taken out

tomobile exception was noted and weighed in the decision in *Rakas*.[7] Though the Court said petitioners still would have lost if the search had been of a dwelling, the diminished expectation of privacy in an automobile was seen as significant by both the majority and the concurring opinions.[8] In *Prouse* the Court also noted the special fourth amendment situation of automobiles.[9] More importantly, the automobile's inferior status was implicit in the Court's application of a reasonable suspicion standard to the stopping of cars, rather than a more stringent warrant or probable cause standard.

Rakas and *Prouse* are also comparable since similar modes of analysis were used in them. This is not readily apparent. At first glance, these decisions appear to be contradictory because the Court has not adopted a consistently liberal or consistently narrow construction of the fourth amendment. However, the Court did apply a similar balancing-test analysis to the two fourth amendment cases. Such analytical consistency might result in a decision in one case which appears philosophically inconsistent with that in another case in the same field. At any rate, these cases, particularly *Rakas*, are important for the changes they have worked in search and seizure law under the fourth and fourteenth amendments.

Rakas v. Illinois

Petitioners were passengers in an automobile matching the description of a robbery getaway car. Police stopped the automobile, searched it, and found a sawed-off rifle under the front passenger seat and a box of rifle shells in the locked glove compartment. Petitioners were charged with armed robbery, and the seized items were admitted as evidence against them. A motion to suppress the items as fruits of an illegal search and seizure was denied on the grounds that petitioners lacked standing since they had never asserted a property interest in either the car or the seized items. Since the trial court ruled that the petitioners lacked standing, it never reached the question of whether the police had probable cause to stop and search the car.[10] Petitioners were convicted and the appellate court affirmed.[11]

Justice Rehnquist wrote the five-member majority opinion for the Court, affirming the conviction. He addressed the petitioners' contention that as the "targets" of the search and seizure, they should be granted standing to assert fourth amendment rights and, alternatively, that since they were, under *Jones v. United States*,[12] "legitimately present" in the automobile, they should be granted standing.[13]

The Court rejected petitioners' target theory on the grounds that it would loosen the rules for standing far beyond their accustomed bounds and would allow vicarious assertion of personal rights.[14] Justice Rehnquist pointed to the long line of cases supporting the view that fourth amendment rights are personal[15] and rejected petitioners' claim that *Jones* conferred standing upon "one against whom the search was directed." Instead, the Court equated that phrase with the statement immediately preceding it, that "one must have been a victim of a search and seizure."[16] The Court refused to equate "victim" with "target," and stated that any target theory was impliedly rejected in *Alderman v. United States*.[17] The statements in *Bumper v.*

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of the exception entirely because it does not have the characteristics that make autos a special case in the first place, *i.e.*, if there is little chance an auto will be moved before a warrant is obtained, then a warrant is needed. *See* Dyke v. Taylor Implement Mfg. Co., 391 U.S. at 220–21; Preston v. United States, 376 U.S. at 367. *But see* United States v. Chadwick, 433 U.S. at 12.

[7] 439 U.S. at 148–49; *id.* at 153–55 (Powell, J., concurring).

[8] Justice Powell justified a different treatment for automobiles by noting that they operate in public, are highly visible, and are extensively regulated. 439 U.S. at 154 n.2 (Powell, J., concurring). *See* United States v. Chadwick, 433 U.S. at 12–13.

[9] 99 S. Ct. at 1401.

[10] Rakas v. Illinois, 439 U.S. at 130–31.

[11] Illinois v. Rakas, 46 Ill. App. 3d 569, 571–72, 360 N.E.2d 1252, 1253–54 (1977).

[12] 362 U.S. 257, 261–62 (1960). Jones had been using a friend's apartment, had a key to it, and kept clothes there. The friend had been away for several days when police burst in on Jones, searched the apartment, and seized narcotics later introduced as evidence against Jones. His motion to suppress was denied because he failed to allege ownership of the contraband or a possessory interest in the apartment. *Id.* at 259.

[13] Rakas v. Illinois, 439 U.S. at 132.

[14] *Id.* at 133–38. *See generally* O'Shea v. Littleton, 414 U.S. 488, 493 (1974); Flast v. Cohen, 392 U.S. 83, 99 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

[15] 439 U.S. at 133–36 (citing Brown v. United States, 411 U.S. 223, 230 (1973); Simmons v. United States, 390 U.S. 377, 389 (1968); Katz v. United States, 389 U.S. 347, 351 (1967); Jones v. United States, 362 U.S. at 261; Gouled v. United States, 255 U.S. 298, 304 (1921)).

[16] 439 U.S. at 134–35 (quoting Jones v. United States, 362 U.S. at 261).

[17] 439 U.S. at 135. The Court in *Alderman* stated that only one whose rights were violated by an illegal wiretap had standing to suppress, not one who was aggrieved solely by the introduction in court of the fruits of the wiretap. 394 U.S. at 171–72. *See also id.* at 188 n.1 (Harlan, J., concurring and dissenting); Wong Sun v. United States, 371 U.S. 471, 492 (1963).

North Carolina[18] and *United States v. Jeffers*[19] on which petitioners relied, according to Justice Rehnquist, were mere dicta since defendants in those cases had not relied upon the target theory to establish standing.[20]

In response to petitioners' argument that, since the exclusionary rule is deterrent in nature, they should be allowed to contest arguably illegal searches and seizures, the Court replied that illegally seized evidence has never been ruled inadmissible in all circumstances[21] and opined that the remedial nature of the rule required that it only be employed in those instances where the benefits outweigh the costs.[22] The Court decided that there was no reason to believe that a party whose fourth amendment rights were infringed would not assert his or her rights in criminal or civil court, thus providing a sufficient deterrent to illegal police action. In any case, additional complainants would add only marginally to the protection of fourth amendment rights.[23]

Before turning to petitioners' second defense of "legitimate presence" in the automobile, the Court first altered the rule for analysis of standing under the fourth amendment. The Court held that in the future, courts should look to "the extent of a particular defendant's rights under the Fourth Amendment, rather than ... [to] any theoretically separate, but invariably intertwined concept of standing."[24]

The Court then rejected the "legitimate presence"concept of *Jones* saying that it believed "the phrase 'legitimately on premises' coined in *Jones* creates too broad a gauge for measurement of Fourth Amendment rights."[25] The Court felt that standing based upon legitimate presence would permit any casual visitor to assert a fourth amendment interest in a part of a house he had never seen or assert such an interest on the dubious grounds that he just happened to be there when the search occurred.[26] The Court looked to *Katz v. United States*[27] for a broader test, more adaptable to a balancing analysis, of whether defendant had a "legitimate expectation of privacy" in the invaded place.[28] In so doing the Court specifically disavowed any intention of tying fourth amendment standing to ownership of the seized articles.[29]

Justice Rehnquist then answered Justice White's dissenting criticism that a "bright line" test like "legitimate presence" would be more workable than a pure balancing test, asserting that whichever test was used, line drawing still would have to be done.[30] Rehnquist noted that a "bright line" test had led to results varying widely among jurisdictions and contended that the "expectation of privacy" concept would more faithfully serve analysis of fourth amendment issues.[31]

The Court concluded that since petitioners had not claimed either a possessory or property interest in the articles seized or demonstrated any expectation of privacy in the areas searched, the petitioners could not claim protection under the fourth amendment.[32] The Court distinguished *Rakas* from *Jones* and *Katz* since petitioners lacked control over

[18] 391 U.S. 543, 548 n.11 (1968).

[19] 342 U.S. 48, 52 (1951).

[20] Rakas v. Illinois, 439 U.S. at 135-36.

[21] *See, e.g.*, United States v. Ceccolini, 435 U.S. 268, 275 (1978); Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974); Wong Sun v. United States, 371 U.S. at 492.

[22] Rakas v. Illinois, 439 U.S. at 134 n.3. The Court's concern with the relative benefits derived from application of the exclusionary rule is by no means a recent phenomenon. *See* Simmons v. United States, 390 U.S. at 390 n.12, where the Court refused to consider whether the deterrence rationale mandated exclusion of all evidence seized illegally. Since then, the cases in note 21 *supra* have shown that the Court will balance the relative benefits of application of the exclusionary rule against its disadvantages to determine whether it should be applied.

[23] 439 U.S. at 134. *See* Monroe v. Pape, 365 U.S. 167 (1961).

[24] 439 U.S. at 139. What the Court seems to have done is eliminate the preliminary "case or controversy" question, *see* note 14 *supra*, and substitute a combined procedural/substantive law test peculiar to fourth amendment standing. For one circuit's interpretation of this rule, see United States v. Williams, 589 F.2d 210, 213 (5th Cir. 1979).

[25] 439 U.S. at 142.

[26] *Id. But see* Brown v. United States, 411 U.S. at 229; Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Bumper v. North Carolina, 391 U.S. at 548 n.11; Simmons v. United States, 390 U.S. at 390.

[27] 389 U.S. at 353.

[28] Rakas v. Illinois, 439 U.S. at 142. *See* United States v. Chadwick, 433 U.S. at 7; United States v. White, 401 U.S. 745, 752 (1971). *See also* Combs v. United States, 408 U.S. 224, 227 (1972); Alderman v. United States, 394 U.S. at 191 (Harlan, J., concurring and dissenting).

[29] 439 U.S. at 142. *But see* Mr. Justice White's dissent in *Rakas*. He claimed the Court was tying fourth amendment standing to ownership of the seized article. *Id.* at 156-57 (White, J., dissenting). For the proposition that rules of property and tort law should not control an assertion of standing, see Alderman v. United States, 394 U.S. at 191 (Harlan, J., concurring and dissenting); Silverman v. United States, 365 U.S. 505, 511 (1961); and Jones v. United States, 362 U.S. at 266.

[30] 439 U.S. at 144.

[31] *Id.* at 145 n.13.

[32] *Id.* at 148-49. The Court pointed to the lesser protection afforded automobiles. *See* note 3 *supra*.

the automobile and the areas searched.[33] Since they normally would not be able to exclude others from those areas, they could not legitimately expect privacy there. Hence, the Court affirmed petitioners' conviction for armed robbery which had been based on the seized evidence.[34]

Justice Powell was joined by Chief Justice Burger in a concurring opinion.[35] Powell identified the question at issue in *Rakas* as "whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances."[36] He noted the pertinent factors to be weighed: whether the defendant took normal precautions to ensure his privacy; how a defendant had used a location; and whether the defendant had a property interest in the area searched.[37] Powell attributed the diminished expectation of privacy one has in an automobile to its use in public, its high visibility, and the extensive regulation to which it is subject.[38] He balanced these factors, as well as those cited by the Court, and found that the petitioners could not reasonably expect "that the car in which they had been riding would not be searched after they were lawfully stopped and made to get out."[39] Justice Powell then reiterated his support for the expectation of privacy rule, which would allow all the many variables to be weighed and balanced, unlike a "bright line" rule like "legitimate presence."[40]

Justice White dissented, expressing the views of four members of the Court. As had the majority, White rejected petitioners' target theory of standing. However, he did accept petitioners' claim for standing under an intersection of the doctrines concerning searches and seizures of automobiles and "legitimate expectation of privacy."[41]

Taking up the rules for automobiles first, White pointed to the line of precedent adjudicating the fourth amendment rights of persons who were the victims of searches and seizures of automobiles though they had no possessory or property interests in those autos.[42] White found it anomalous that the Court now, in a factually similar situation, claimed that petitioners had no standing.[43]

White then addressed the question of whether petitioners' expectation of privacy had been violated.[44] He noted that standing might be predicated upon the fact that, under the rule in *Terry v. Ohio*, the petitioners had been seized.[45] This would arguably allow petitioners to contest the seizure of the rifle and shells as fruits of an illegal stop, though that stop would only have to be justified by the existence of reasonable suspicion,[46] not probable cause.[47]

White briefly noted that *Jones* had conferred

[33] 439 U.S. at 149.

[34] *Id.* at 150. The Court characterized petitioners' failure to prevail here as a failure to assert "that they had any legitimate expectation of privacy in the areas of the car which were searched." *Id.* at 149 n.17. Though there was some warning that "expectation of privacy" should be pleaded, it is unfortunate that petitioners may have lost simply because they were unlucky enough to have the Court change the rules on them at the last minute. Fortunately, although they still lost, it appears that petitioners had their side of the argument taken up for them, and weighed by Powell in his concurring opinion.

[35] *Id.* at 150 (Powell, J., joined by Burger, C.J., concurring). Powell's concurring opinion is particularly important considering the split of the Court. Only three Justices limited themselves to Justice Rehnquist's majority opinion. Though Justice Powell and the Chief Justice joined in it, their concurring opinion substantially added to it, making it clear that at least Powell and Burger thought they were applying a normal balancing test, as had been done in the probable cause/reasonable suspicion cases. Faced with a solid four Justice dissent, Powell's opinion becomes important as the expression of two essential swing votes.

[36] *Id.* at 152. This rule unfortunately gets into the question of probable cause for the search, a question Powell conceded was never addressed. *Id.* at 151. If this was actually the rule applied by the majority, then maybe the case should have been remanded for a determination of probable cause so that all the factors in the "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers" could be weighed to determine the reasonableness of the search and seizure. Pennsylvania v. Mimms 434 U.S. at 109 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)). *See also* Camara v. Municipal Court, 387 U.S. at 535.

[37] 439 U.S. at 152–53 (Powell, J., concurring).

[38] *Id.* at 154 n.2. *See also* note 3 *supra.*

[39] 439 U.S. at 155 (Powell, J., concurring). *See* note 36 *supra.*

[40] 439 U.S. at 155–56 (Powell, J., concurring).

[41] *Id.* at 157–58 (White, J., dissenting).

[42] *Id.* at 159 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Chambers v. Maroney, 399 U.S. at 42; Dyke v. Taylor Implement Mfg. Co., 391 U.S. at 216; Preston v. United States, 376 U.S. 364 (1964); Husty v. United States, 282 U.S. 694 (1931)).

[43] 439 U.S. at 158 (White, J., dissenting).

[44] *Id.* at 159.

[45] *Id.* at 160 n.5. Terry v. Ohio, 392 U.S. 1, 16 (1968), was extended to autos in Adams v. Williams, 407 U.S. at 146 and United States v. Brignoni-Ponce, 422 U.S. at 878.

[46] *See generally* Delaware v. Prouse, 99 S. Ct. 1391 (1979); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Adams v. Williams, 407 U.S. 143 (1971); Terry v. Ohio, 392 U.S. 1 (1968).

[47] Rakas v. Illinois, 439 U.S. at 160 n.5 (White, J., dissenting). *See* United States v. Ortiz, 422 U.S. 891, 896–97 (1975); Almeida-Sanchez v. United States, 413 U.S. at 269.

automatic standing in a situation where a defendant was charged with a possessory crime. This presented the defendant with the dilemma of asserting ownership of contraband in order to establish fourth amendment standing, an admission that might be used to convict him. The prosecution, on the other hand, would assert, for fourth amendment purposes, that defendant did not own the contraband, but did possess it for purposes of committing the crime.[48] White concluded that it was an open question whether automatic standing was still a valid doctrine.[49]

White pointed to *Jones* as holding that a "legitimate presence"on the premises automatically established a legitimate expectation of privacy.[50] White defended this standard, accusing the majority of requiring a property interest to establish standing.[51] He found this inconsistent with case law holding that an owner experienced no fourth amendment violation when a nonowning joint user of property consented to a search.[52] White characterized the Court's privacy test as too ambiguous. Unlike the "bright line" drawn by the legitimate-presence test, a balancing test based upon expectation of privacy would not provide a clear guideline for checking police actions.[53]

White also claimed that the majority's test was unfaithful to the fourth amendment.[54] The new rule would cause an increase in illegal automobile stops and searches since the police would know passengers could not object to those stops. This would decrease the deterrent effect of the exclusionary rule. For these reasons, White thought petitioners should have been granted standing to assert fourth amendment rights.[55]

ANALYSIS OF *RAKAS*

Petitioners' invitation to the Court to extend standing to the target of a search and seizure had only minimal support in past decisions. Petitioners relied upon language in *Jones v. United States*[56] implying that anyone against whom a search and seizure was directed might have standing to contest it. The Court in *Jones* never intended to set the stage for such a broad measure of standing. It held that defendant had standing under a theory of "legitimate presence," or alternatively, under a theory of automatic standing for one charged with a possessory crime.[57]

Petitioners' reliance upon *Bumper v. North Carolina*[58] was also illplaced. There, the house where defendant lived was illegally searched.[59] Though the Court referred to the "target" language of *Jones*, the facts of *Bumper* fit well within the bounds of the "legitimate expectation of privacy" rule and the Court never really addressed the applicability of a "target" rule for standing.[60]

The concept of a "target" rule first appeared in Justice Fortas' concurring and dissenting opinion in *Alderman v. United States*.[61] Justice Fortas offered a reasoned opinion, detailing the advantages of a "target" rule. He raised the specter of unchecked violation of fourth amendment rights by the government in the absence of such a rule,[62] but dismissed the extensive precedent emphasizing the personal nature of fourth amendment rights[63] as the result of a mistaken confusion of the fourth with the fifth amendment.[64]

Whether mistaken or not, the personal nature of fourth amendment rights is not a doctrine which should be taken lightly. As the Court noted in *Rakas*, there is no reason to think that those whose rights are violated will not defend them in either criminal or civil proceedings.[65] More importantly, what would happen if parties were allowed to

[48] Rakas v. Illinois, 439 U.S. at 160 n.6 (White, J., dissenting).

[49] *Id. See* Brown v. United States, 411 U.S. at 228; Simmons v. United States, 390 U.S. at 390.

[50] 439 U.S. at 162 (White, J., dissenting).

[51] *Id*; *see* note 29 *supra*.

[52] 439 U.S. at 163 & n.11 (White, J., dissenting) (citing United States v. Matlock, 415 U.S. 164, 169, 171 n.7 (1974); Frazier v. Culp, 394 U.S. 731, 740 (1969)).

[53] Rakas v. Illinois, 439 U.S. at 166 (White, J., dissenting).

[54] *Id.* at 168 n.21.

[55] *Id.* at 167-69.

[56] 362 U.S. at 267.

[57] *Id.* at 263-64, 267. The Court in *Rakas* was correct, therefore, when it asserted that petitioners were quoting words from *Jones* out of context in order to advance their "target" theory. *See* 439 U.S. at 135.

[58] 391 U.S. at 548 n.11.

[59] *Id.* at 546.

[60] *Id.* at 548 n.11; *cf.* Mancusi v. DeForte, 392 U.S. 364 (1968) (expectation of privacy in union office shared with others); Katz v. United States, 389 U.S. 347 (1967) (expectation of privacy in phone booth), both decided about the same time.

[61] Alderman v. United States, 394 U.S. at 201 (Fortas, J., concurring and dissenting). The Court in *Rakas* cited the majority opinion in *Alderman* as "impliedly" rejecting the "target" theory, but this claim must have been based more on the existence of Justice Fortas' separate opinion than upon any other factor in *Alderman*. 439 U.S. at 136. *See* note 17 *supra*.

[62] 394 U.S. at 201 (Fortas, J., concurring and dissenting).

[63] *See* note 15 *supra*.

[64] 394 U.S. at 204-05 (Fortas, J., concurring and dissenting).

[65] 439 U.S. at 134.

vicariously assert fourth amendment rights? Could the resolution of a third-party suit prejudice a later assertion of those same rights by the person whose expectation of privacy was actually invaded? If so, the person might be harmed unnecessarily if the third party did not do as good a job of protecting the individual's rights as the individual would have himself. If not, the same rights might be litigated many times by different people, possibly resulting in contrary decisions on the same facts.

Petitioners convincingly argued that the target theory's wider exclusionary rule would better deter fourth amendment violations.[66] However, the Court was on solid precedential ground when it employed a balancing test, weighing the deterrent benefits of such a rule against the social costs of a heavily burdened court system.[67] " '[T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' "[68] This sentiment has been expressed consistently by the Court in recent years as it has wrestled with the problem of ensuring law and order without restricting personal freedom.[69]

The Court's decision in *Rakas*, however, did depart from past precedent in search and seizure law to some extent. The Court discarded "legitimate presence" as a factor determinative of standing to assert fourth amendment rights and retreated to the "legitimate expectation of privacy" test upon which the "legitimate presence" standard had been based. This legitimate expectation of privacy test was outlined in *Katz v. United States*,[70] where the Court identified the test for fourth amendment standing as whether the government action "violated the privacy upon which ... [defendant] justifiably relied ...." The test was used consistently in the intervening years,[71] the Court sometimes holding that certain facts indicated a legitimate expectation of privacy and thus established standing. The Court recognized legitimate expectations of privacy in private conversations involving the defendant,[72] in premises where the defendant had a possessory or property interest,[73] and in a double-locked footlocker,[74] while rejecting allegations of legitimate expectations of privacy in information open to public view.[75] Though it preceded much of the expectation-of-privacy jurisprudence, the "legitimate presence" of *Jones* was viewed as another of these situations where privacy would be legitimately expected.[76] Throughout the same period of time, the Court continually stressed the personal (not vicarious) nature of fourth amendment standing[77] and its lack of reliance upon traditional concepts of tort and property law,[78] thus illustrating the fourth amendment's protection of *personal privacy*. Hence, it was surprising to see the Court discard the "legitimate presence" test in *Rakas*.

In *Jones v. United States*,[79] the Court held that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." Alternatively, the Court held that a person charged with a possessory offense had automatic standing to object to a search and seizure of the articles forming the basis for the possessory offense.[80] In *Rakas*, the Court virtually ignored the automatic standing holding,[81] and when petitioners claimed standing because they were "legitimately on [the] premises," it rejected that rule as too broad, ignoring intervening cases that cited it as good law.[82]

Eight years after *Jones*, in *Simmons v. United States*,[83] *Bumper v. North Carolina*,[84] and *Mancusi v. DeForte*,[85] the Court still referred to the "legitimate presence" rule. The doctrine was not the basis for standing in any of those cases, yet it was cited with approval by all of them. *Brown v. United States*,[86] decided in 1973, considered the "legitimate pres-

[66] *Id.* at 132-33.

[67] *Id.* at 134 n.3. *See also* United States v. Ceccolini, 435 U.S. at 275-76.

[68] Rakas v. Illinois, 439 U.S. at 134 n.3 (quoting United States v. Calandra, 414 U.S. at 348).

[69] *See* United States v. Ceccolini, 435 U.S. at 275-76; Stone v. Powell, 428 U.S. at 486; United States v. Calandra, 414 U.S. at 348-50; Alderman v. United States, 394 U.S. at 174-75; Simmons v. United States, 390 U.S. at 390. *But cf.* United States v. Calandra, 414 U.S. at 356-57 (Brennan, J., dissenting) (purpose of exclusionary rule is not deterrence, it is justice).

[70] 389 U.S. at 353.

[71] *See* cases cited in note 28 *supra*.

[72] Alderman v. United States, 394 U.S. at 176.

[73] *Id.*; Combs v. United States, 408 U.S. at 227. *See also* Wong Sun v. United States, 371 U.S. at 492.

[74] United States v. Chadwick, 433 U.S. at 11.

[75] Air Pollution Control Bd. v. Western Alfalfa Corp., 416 U.S. at 865.

[76] *See* Rakas v. Illinois, 439 U.S. at 161 (White, J., dissenting).

[77] *See* cases cited in note 15 *supra*.

[78] *See* note 29 *supra*.

[79] 362 U.S. 257, 267 (1960).

[80] *Id.* at 263-64.

[81] 439 U.S. at 135 n.4.

[82] *Id.* at 142-43.

[83] 390 U.S. at 390.

[84] 391 U.S. at 548 n.11.

[85] 392 U.S. at 368.

[86] 411 U.S. at 229.

ence" rule as a test for standing, but rejected its use because defendants in *Brown* had not been present at the search and seizure. That was the last time, prior to *Rakas*, that the test was cited by the Court.

Nonetheless, the *Rakas* Court's reasons for eliminating the "legitimate presence" rule were basically sound. It is difficult to justify granting standing to anyone who just "happens" to be on the premises when a search occurs. Unlike a "legitimate presence" rule, a simple question of whether a legitimate expectation of privacy was violated might better avoid reliance upon traditional tort and property law concepts.[87] That way, one is not asserting that he should have fourth amendment standing simply because he had permission from the owner to be there. He is claiming standing because he reasonably believed that his privacy would not be violated.[88] A rule based directly upon privacy is more faithful to the spirit of the fourth amendment because it does not rest standing upon the chance physical location of a person at any given time, but upon the degree of privacy a person legitimately can expect. There often will be a correlation between property owned and privacy expected, but unlike a "legitimate presence" rule, the question of privacy is at the forefront, where it belongs. In *Rakas*, petitioners certainly had a legitimate expectation of privacy in their own persons,[89] but there is no reason why they should have such an expectation in articles they did not claim to own or have an interest in.

The alternative basis of standing found in *Jones*, automatic standing to contest a search and seizure for one charged with a possessory crime,[90] has not been invoked often, but offers a logical answer to a thorny question. The Court in *Jones* was concerned with two things: that a defendant not be made to admit to the essential element of a possessory offense—possession—in order to establish standing[91] and that the government not be allowed to argue contradictorily that defendant did not possess the seized articles for purposes of establishing standing, but did for purposes of proving the crime.[92] The Court resolved this dilemma by allowing automatic standing in such a situation.

This dilemma of *Jones* was addressed extensively in *Simmons v. United States*,[93] where, at a pretrial hearing defendant claimed ownership of a suitcase containing evidence of a robbery in order to establish fourth amendment standing, only to have that testimony introduced against him at trial. Relying upon the reasoning of *Jones*, the *Simmons* Court held that such testimony was not admissible at trial.[94] Whether this new rule against admissibility replaced the automatic standing of *Jones* was not addressed. The defendant's dilemma was solved, but the government's ability to allege contradictorily possession and nonpossession by the defendant at the same time was not limited. The question of the "automatic standing" rule's continued viability was specifically reserved in *Brown v. United States*,[95] and in *Rakas*, the majority and dissenting opinions gave the issue only passing notice.[96]

If the facts in *Rakas* fall within any concept, it is the "automatic standing" rule of *Jones*. However, both petitioners and the Court ignored this rule. The fact situation was quite similar to *Jones*: charged with a possessory offense,[97] petitioners were denied standing to contest a seizure because they did not admit ownership of the articles that would insure their conviction. The reasoning of the Court in *Jones* is just as valid today. Presumably what petitioners should have done was admit ownership in a pretrial proceeding, under the rule in *Simmons*. However, since they did not, the Court should have invoked the automatic standing rule of *Jones*. Possibly the Court in *Rakas* thought the expectation of privacy test left no room for an exception like automatic standing.

[87] *See* note 29 *supra*.

[88] *Cf.* Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring) (two-part test: whether subjectively expected privacy to be invaded and whether such belief was reasonable).

[89] *See* text accompanying note 45 *supra*.

[90] 362 U.S. at 263.

[91] *Id.* at 261-62. The opinion noted that this might cause a defendant to perjure himself, claiming possession for purposes of standing and denying it for purposes of the possessory charge. *Cf.* Simmons v. United States, 390 U.S. at 398 (Black, J., concurring and dissenting) (rule against introduction of pretrial testimony of ownership for standing purposes encourages defendant to falsely allege ownership).

[92] 362 U.S. at 263-65.

[93] 390 U.S. at 380. *Cf.* United States v. Jeffers, 342 U.S. at 50-52 (defendant claimed ownership of contraband to establish standing).

[94] Simmons v. United States, 390 U.S. at 389-90.

[95] 411 U.S. at 228. The Court in *Rakas* was faced with the same situation as in *Simmons*. The defendant in *Simmons* asserted ownership when he should have kept quiet and asked for automatic standing. The Court rescued him from his folly by suppressing his pretrial testimony. In *Rakas*, petitioners failed to assert ownership as they should have under *Simmons*, but the Court did not rescue them from their folly.

[96] 439 U.S. at 135 n.4; *id.* at 160 n.6 (White, J., dissenting).

[97] *Cf.* Simmons v. United States, 390 U,S. at 380 (evidence of robbery).

DEVELOPMENTS AFTER *RAKAS*

The Court's failure to apply the automatic standing rule of *Jones* in *Rakas* is important to note. It is ironic that a defendant can be convicted on the strength of his possession of a weapon used in a crime, but has no standing to contest seizure of the weapon because he has not admitted possession. Viewed in its most favorable light, *Rakas* stands as a warning to the defendant to assert ownership of any seized item if he expects to be able to suppress its use against him. His testimony asserting ownership could then be suppressed under the holding in *Simmons*. However, if the outcome in *Rakas* is to be taken as an indication that the dilemma argument is no longer persuasive, then *Simmons* may no longer be good law. In that event, a defendant charged with possession would find it impossible to establish standing without incriminating himself. He might challenge the seized item as the fruit of an illegal search, but in order to gain fourth amendment standing, he would have to make the difficult showing of an invasion of his own legitimate expectation of privacy.

The Court's expectation of privacy analysis was surprising in that it rejected "legitimate presence" as determinative of standing. This decreases the scope of fourth amendment protection, but the decrease is more potential than real. The "legitimate presence" rule had not been exploited by the Court to the extent it could have been and thus does not represent that much of a loss in real terms.[98]

The Court's rejection of "legitimate presence" can be seen as a shift toward a pure balancing test for resolving fourth amendment issues. The "bright line" of legitimate presence has been discarded, forcing the defendant to rely upon a more ambiguous "expectation of privacy" test. This will put more emphasis on the fact situation of a particular case and require the Court to weigh the numerous competing variables on a balancing test. There are still a few "bright line" indications of expectation of privacy that can be invoked.[99] However, *Rakas* may be a warning that these factors no longer hold the importance they once did. The "legitimate expectation of privacy" balancing test may now reign supreme in fourth amendment standing.

Delaware v. Prouse

An automobile owned and occupied by respondent was stopped by an officer for a routine license and registration check. The officer had observed no traffic or equipment violations prior to the stop, and was not following guidelines or procedures set by his superiors in conducting the arbitrary stop. The officer smelled marijuana smoke as he was walking toward the car, ordered occupants out, and then seized marijuana in plain view on the car's floor. Respondent was indicted for illegal possession of a controlled substance and moved to suppress admission of the marijuana as the fruit of an illegal seizure.[100] The trial court granted the motion, and the Delaware Supreme Court affirmed on the grounds that "a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution."[101]

On review, Justice White, who had dissented in *Rakas*, wrote the majority opinion, expressing the view of eight members of the Court. The majority first determined that review by the Court was not precluded by the state court's reliance upon the Delaware Constitution to invalidate the seizure. The Delaware Supreme Court had used fourth amendment cases to decide *Prouse*, recognizing that under *Mapp v. Ohio*, the state constitution was to be construed to provide at least as much protection as the fourth amendment.[102] Therefore, the Court concluded, the Delaware Supreme Court had not independently rested its decision upon the Delaware Constitution, and the Supreme Court had jurisdiction to review its decision.[103]

Justice White reasoned for the Court that stopping an automobile and detaining its occupants does constitute a seizure under the fourth amendment.[104] He noted that the fourth amendment was designed to protect individual privacy from unreasonable intrusions by the government.[105] The reasonableness of a particular search and seizure can be determined "by balancing its intrusion on the

[98] *See* text accompanying notes 77–86 *supra*.

[99] *See* text accompanying notes 72–74 *supra*.

[100] Delaware v. Prouse, 382 A.2d 1359, 1361 (Del. 1978).

[101] *Id.* at 1364.

[102] Delaware v. Prouse, 99 S. Ct. at 1395 (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)). *See also* State v. Moore, 187 A.2d 807 (Del. Super. Ct. 1963).

[103] 99 S. Ct. at 1395.

[104] *Id.* at 1396. *Cf.* Terry v. Ohio, 392 U.S. at 16 (detaining a person short of arrest constitutes a seizure) extended to automobiles in Adams v. Williams, 407 U.S. at 146 and United States v. Brignoni-Ponce, 422 U.S. at 878.

[105] 99 S. Ct. at 1396.

individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[106] Justice White explained that the facts supporting an intrusion must, however, be measurable against an "objective standard," either probable cause or a less stringent test.[107] This requirement is designed to make sure an official does not use his discretion to interfere with an individual's legitimate expectation of privacy.[108]

In applying such a test, White turned by analogy to the Court's recent decisions in a series of border search cases. In *United States v. Brignoni-Ponce*, the Court held: "'Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.'"[109] Soon afterward, the Court held in *United States v. Martinez-Fuerte*,[110] that stops without reasonable suspicion may be made at fixed border patrol checkpoints, because the resultant intrusion is only minimal. The Court decided that the intrusion in *Prouse* was similar to that in *Brignoni-Ponce*. Since both involved a stop by a roving officer, the physical and psychological intrusion were thought to be the same.[111] Hence, the Court found itself faced with the question of whether state interests in traffic safety justify a random stop, though national interests in controlling immigration do not.[112]

The Court agreed that Delaware had a vital interest in promoting traffic safety, but thought, nonetheless, there were better, less intrusive alternatives in enforcement than random stops.[113] State requirements for licensing, registration, and insurance were deemed effective enough that spot checks would make only marginal additions to traffic safety.[114] The Court hypothesized that unqualified drivers would be more likely to violate traffic laws and thus would provide officers with reasonable suspicion for stopping them.[115] Equipment violations are for the most part observable and, thus, will also provide reasonable suspicion for a stop.[116] Therefore, the Court concluded that considerations of traffic safety did not justify stops without reasonable suspicion.[117]

The Court in *Prouse* held that:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.[118]

Justice White also noted that states might develop

[106] *Id. See* Pennsylvania v. Mimms, 434 U.S. at 109; United States v. Martinez-Fuerte, 428 U.S. at 555; United States v. Brignoni-Ponce, 422 U.S. at 878; Terry v. Ohio, 392 U.S. at 20–21; Camara v. Municipal Court, 387 U.S. at 535. The use of a balancing test in fourth amendment cases was first developed in a series of administrative search and seizure cases. *See* See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. at 535. To justify building code inspections, the public interest in enforcing the codes was balanced against the invasions of privacy occasioned by the inspections in order to determine whether such inspections were reasonable. (They were, with a warrant). *Id.* at 537–38. *Terry* was the first nonadministrative case in which a strict balancing test was employed. *See* Terry v. Ohio, 392 U.S. at 20–21.

[107] 99 S. Ct. at 1396.

[108] Delaware v. Prouse, 99 S. Ct. at 1396–97. Though the Court asserted that it was trying to foreclose discretionary intrusions by officials, in practice it has not done a very good job. Allowing an officer to make a limited stop and search on the basis of reasonable suspicion in *Terry* placed a large grant of discretionary power in official hands. Though *Terry* attempted to place limits on this power by requiring "specific articulable facts" to justify the reasonable suspicion, these limits have amounted to little in practice. Terry v. Ohio, 392 U.S. at 21. *See* United States v. Brignoni-Ponce, 422 U.S. at 884–85; Adams v. Williams, 407 U.S. at 146. The Court may be able to weigh the relative importance of a governmental interest in traffic safety, but many of an officer's grounds for reasonable suspicion are necessarily going to be highly subjective, and thus difficult to measure and verify.

[109] Delaware v. Prouse, 99 S. Ct. at 1397 (quoting United States v. Brignoni-Ponce, 422 U.S. at 884 (footnote omitted)).

[110] 428 U.S. at 557.

[111] 99 S. Ct. at 1398.

[112] *Id.* The Court specifically reserved this question in United States v. Brignoni-Ponce, 422 U.S. at 883 n.8.

[113] 99 S. Ct. at 1398. *But see* Cady v. Dombroski, 413 U.S. at 447.

[114] 99 S. Ct. at 1398–99. *But see* Justice Rehnquist's dissenting argument that spot checks have a significant deterrent effect on unlicensed motorists. *Id.* at 1402–03 (Rehnquist, J., dissenting).

[115] 99 S. Ct. at 1399. Rehnquist's response was that the Court was hampering prevention of accidents, by catching unqualified drivers after their unsafe conduct has occurred. *Id.* at 1402 (Rehnquist, J., dissenting).

[116] Delaware v. Prouse, 99 S. Ct. at 1399; *cf.* Pennsylvania v. Mimms, 434 U.S. at 106 (stop for equipment violation).

[117] 99 S. Ct. at 1401.

[118] *Id.*

less intrusive methods for spot checks or methods that bind officer discretion. Roadblock-type stops, weigh-stations, and inspection checkpoints were offered as examples of permissible methods.[119]

Justice Blackmun, joined by Justice Powell, filed a short concurring opinion clarifying the circumstances under which they had joined the majority. Blackmun stressed that roadblocks and systematic stops, "such as every 10th car," would not be precluded by the decision, and that he would not apply the rationale of the Court to random stops by game wardens in the exercise of their duties.[120]

Justice Rehnquist, the sole dissenter, applied the same balancing test as the Court, but determined that random stops for traffic safety reasons were justified in the absence of reasonable suspicion.[121] He took issue with the Court's assumptions concerning traffic safety, which were made in the absence of empirical evidence, and questioned how the Court logically could authorize *en masse* intrusions of privacy at roadblocks, but not individual intrusions by random stops.[122] Justice Rehnquist would have held for the state upon the basis that the state's actions deserved a presumption of validity.[123]

ANALYSIS OF *PROUSE*

In *Prouse* the Court compared the intrusion upon individual security and privacy interests to legitimate governmental interests advanced by a random stop and concluded that the intrusion was not reasonable. In so doing, the Court faithfully applied the balancing/reasonableness test it had developed in a long line of cases.

In *Terry v. Ohio*,[124] the Court distinguished the warrant requirement of the fourth amendment from the rule against unreasonable searches and seizures and stated that, historically, police action under exigent circumstances had only been subject to the latter standard. It drew its balancing test for determining reasonableness from a line of administrative search and seizure cases,[125] quoting from *Camara v. Municipal Court*:

> [It] is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[126]

The transfer of this test from the sphere of administrative searches and seizures to use in the analysis of criminal searches and seizures was successful. The Court continued to use the test, substantially unchanged, up to and including its decision in *Prouse*.[127]

An important variable in the balancing test is the "quantum of individualized suspicion"[128] justifying a search and seizure. The Court has required different levels of individualized suspicion, depending upon the extent to which individual privacy and security interests have been invaded and upon the importance of governmental interests advanced. These levels of suspicion range from no suspicion at all[129] to reasonable suspicion[130] and probable cause.[131] They are used to justify requests for warrants as well as warrantless "reasonable" searches and seizures.[132]

[119] *Id.* at 1401 n.26.

[120] *Id.* at 1401 (Blackmun, J., concurring).

[121] *Id.* at 1402 (Rehnquist, J., dissenting).

[122] *Id.* at 1402-03.

[123] *Id. See, e.g.*, McDonald v. Board of Election, 394 U.S. 802 (1969).

[124] 392 U.S. at 20.

[125] *See* Camara v. Municipal Court, 387 U.S. at 535-37.

[126] Terry v. Ohio, 392 U.S. at 20-21 (quoting Camara v. Municipal Court, 387 U.S. at 534-35, 536-37).

[127] *See* note 106 *supra*.

[128] Delaware v. Prouse, 99 S. Ct. at 1396 (quoting United States v. Martinez-Fuerte, 428 U.S. at 560). *See* Terry v. Ohio, 392 U.S. at 21 n.18.

[129] The "plain view" cases may be analogized to this since once the officer is legitimately in a position to view contraband, he can seize it without any further justification. *See* note 4 *supra*, for the inventory and car care cases where automobiles in police custody may be searched without a warrant and without showing any level of individualized suspicion.

[130] *See* United States v. Martinez-Fuerte, 428 U.S. at 555-56; United States v. Ortiz, 422 U.S. at 897; United States v. Brignoni-Ponce, 422 U.S. at 883; Almeida-Sanchez v. United States, 413 U.S. at 279; Adams v. Williams, 407 U.S. at 146; Terry v. Ohio, 392 U.S. at 21.

[131] "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient." Stacey v. Emery, 97 U.S. 642, 645 (1878). *See* note 4 *supra*.

[132] Probable cause must be shown to obtain a normal search warrant. *See* U.S. CONST. amend. IV; United States v. United States Dist. Court, 407 U.S. 297 (1972). To justify an administrative search warrant the less stringent test of whether "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]," is used. Marshall v. Barlow's, Inc., 436 U.S. at 320 (quoting Camara v. Municipal Court, 387 U.S. at 538). *Cf.* Almeida-Sanchez v. United States, 413 U.S. at 283 (Powell, J., concurring) (suggesting issuance of "area" warrants for border searches).

The reasonable suspicion standard used in *Prouse* first appeared in *Terry*. Prior to this, a standard "less stringent" than probable cause was employed in administrative search and seizure cases to justify the issuance of search warrants,[133] but no standard less than probable cause had been applied for a warrantless search not falling under one of the traditional exceptions to the search warrant rule.[134] *Terry* was a response to *Mapp v. Ohio*[135] and its application of the fourth amendment to the states. For the first time, "stop and frisk" tactics traditionally employed by the police were subject to review under the fourth amendment of the Constitution. The Court in *Terry* held that:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous... he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[136]

This standard was broadened in *Adams v. Williams*,[137] where the Court ruled that an officer relying solely upon facts supplied by an informant had reasonable suspicion for conducting a weapons search. The rulings in *Terry* and *Adams* that detention of a person constituted a seizure under the fourth amendment were later extended to automobile stops in the border-search cases.[138]

The Court has taken a step-by-step approach in analyzing automobile search and seizure cases, examining each case on its facts, and incrementally expanding fourth amendment law to cover those facts. The Court used this method to analyze *Almeida-Sanchez v. United States*,[139] *United States v. Brignoni-Ponce*,[140] *United States v. Ortiz*,[141] *United States v. Martinez-Fuerte*,[142] *Pennsylvania v. Mimms*,[143] and most recently, *Prouse*.[144] *Prouse* fits well within the analytical framework of this progression of cases. Due to its emphasis on a balancing test and on a case-by-case analysis of the facts, the Court has made no broad rulings either expanding or contracting the protections provided in auto search and seizure cases. The holding in *Prouse* was predictable, however, since its facts were so similar to *Brignoni-Ponce*, the only prior instance of a stop by a roving patrol car for no articulable reason.[145]

DEVELOPMENTS AFTER *PROUSE*

The outcome of a future case, factually dissimilar from past decisions, is difficult to predict. The governmental and individual interests weighed by the Court's balancing test are almost impossible to quantify. Past cases give a good idea of which arguments should be made in an auto search and seizure case, and an even better idea of how they should be made, but they offer no guide for determining the weight those arguments will be given.

[133] *See* note 132 *supra*.

[134] *See* note 4 *supra*.

[135] 367 U.S. at 30.

[136] 392 U.S. at 30.

[137] 407 U.S. at 146–47. An officer was told by an informant that a man sitting in a car possessed heroin and was armed. The officer proceeded to the car and asked the defendant to get out. When he rolled down the window instead, the officer reached in and seized the gun, and arrested him. *Id.* at 145. There was strenuous objection to extension of the rule of *Terry*. Besides allowing the officer to rely upon an informant, *Adams* involved a possessory offense without the potential for violence that so worried the Court in *Terry*. *See* Adams v. Williams, 407 U.S. at 153 (Marshall, J., dissenting); *cf.* Terry v. Ohio, 392 U.S. at 35 (Douglas, J., dissenting) (warning of dangers of permitting a detention and search on less than probable cause).

[138] *See* note 104 *supra*.

[139] In Almeida-Sanchez v. United States, 413 U.S. at 273, the Court held that border patrol officers needed some sort of individualized suspicion to make a roving stop and search of an automobile.

[140] The Court in United States v. Brignoni-Ponce, 422 U.S. at 883, required that a border patrol officer have reasonable suspicion for a stop.

[141] In United States v. Ortiz, 422 U.S. at 896–97, the Court held that probable cause must be shown for a search at a fixed border patrol checkpoint.

[142] In United States v. Martinez-Fuerte, 428 U.S. at 562, the Court ruled that no suspicion need be shown to stop an automobile at a fixed border patrol checkpoint.

[143] Pennsylvania v. Mimms, 434 U.S. at 112, a non-border case, included a stop for an equipment violation and a subsequent order to the driver to get out. The Court held that once an officer had shown an individualized suspicion sufficient to justify the stop, he could order the driver out of the car without any further showing of suspicion.

[144] The balancing/reasonableness test lends itself rather well to this case-by-case analysis. It would be almost impossible to adopt an incremental approach, distinguishing each case on its facts, if the Court were to apply a broad rule.

[145] Actually there was an articulable reason: the automobile in *Brignoni-Ponce* contained persons who appeared to be of Mexican descent. However, the Court held that this did not constitute reasonable suspicion for a stop. 422 U.S. at 886.

Procedures for oversight will have to be developed to ensure that the essentially subjective determination of reasonable suspicion not be abused. It seems probable that the Court will consider stops without reasonable suspicion at roadblocks as reasonable under the fourth amendment.[146] The Court also implied in *Prouse* that "two-stage" checkpoint stops where "some vehicles may be subject to further detention for safety and regulatory inspection," will be held constitutional.[147] States possibly could build turn-offs from major roads similar to weigh stations, but intended for license checks. The Court specifically limited its decision so that weigh stations would not be affected.[148] However, this did not answer the question of whether semi-trailer trucks may be randomly stopped to check their licenses and weight papers. The states have legitimate interests in the regulation and safety of the trucking industry not applicable to other vehicles.

The Court encouraged the states to develop less intrusive methods of spot checking that would limit individual officers' discretion.[149] Stopping every tenth car to pass a given point, as suggested by Justice Blackmun in his concurring opinion, might fit these guidelines.[150] A systematic roving patrol, such as having individual officers stop all cars with a license number ending in a particular digit, might fail the constitutional test since motorists might not see others being stopped and thus suffer the greater fear of being singled out for inspection.[151] Perhaps groups of patrol cars under administrative direction could be used to stop long lines of cars for traffic checks. Whatever systematic methods are used, controls should be instituted to make sure they are followed by officers. It is possible that systematic methods may not be as effective as random stops in promoting traffic safety. A rise in the number of traffic accidents may be the result.[152]

[146] *See* Delaware v. Prouse, 99 S. Ct. at 1401 & n.26; *cf.* United States v. Martinez-Fuerte, 428 U.S. at 563 (fixed border checkpoints are permissible).

[147] 99 S. Ct. at 1401 n.26.

[148] *Id.*

[149] *Id.* at 1401.

[150] *Id.* (Blackmun, J., concurring).

[151] *Cf.* Delaware v. Prouse, 99 S. Ct. at 1397–98 and United States v. Ortiz, 422 U.S. at 895 (fear caused by stop invades individual privacy).

Conclusion

Though *Rakas* and *Prouse* involved wholly different issues in fourth amendment law, they are instructive when treated in common. They provide an effective illustration of the procedure currently employed by the Court to analyze fourth amendment issues.

Rakas revealed the Court's preoccupation with a fourth amendment balancing test. The Court discarded a "bright line" test of legitimate presence to establish standing and instead required use of the more ambiguous test of legitimate expectation of privacy. This shift toward a balancing test made *Rakas* appear to signal a change in judicial philosophy toward search and seizure law. However, it is the mode of analysis which has changed, not the substantive scope of the fourth amendment.

In both *Rakas* and *Prouse*, numerous peculiarities of the factual situation were examined and weighed to determine whether legitimate expectations of privacy had been invaded. The lessened protection afforded automobiles and the level of individualized suspicion justifying the invasions were factors in these determinations. In *Rakas* the Court determined that there was no invasion of privacy, so petitioners lacked standing. However, in *Prouse*, standing was established since respondent's legitimate expectation of privacy was invaded. The Court then determined the extent to which the legitimate expectation of privacy had been invaded and balanced that value against the governmental interests justifying the intrusion. The Court decided the balance was unreasonable and thus violated the fourth amendment.

Rakas and *Prouse* thus actually demonstrate the consistency with which the Court is now analyzing fourth amendment cases. The same analytical method was employed in both cases; together they offer a prime example of the current Court's objective balancing analysis unencumbered by predilections of the legitimate scope of governmental searches and seizures.

[152] *See* Delaware v. Prouse, 99 S. Ct. at 1402 (Rehnquist, J., dissenting).